SN AKMIDA HOLDINGS SDN BHD v. KERAJAAN MALAYSIA

HIGH COURT MALAYA, KUALA LUMPUR
ALIZA SULAIMAN J
[ORIGINATING SUMMONS NO: WA-24C(ARB)-39-10-2020]
8 NOVEMBER 2021

Abstract – *Construction work contracts, to which the Government is a party, is not included in the list of categories of contracts set out in the Schedule to Part II of the Temporary Measures for Reducing The Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ('Covid-19 Act'). If Parliament had intended to include Government construction work contracts in item 1 in the list of categories of contracts as set out in the Schedule for the purposes of s. 7 of the Covid-19 Act, it would have provided words to that effect. By not having done so, Government construction work contracts were meant to be covered by necessary implication.*

CONTRACT: *Construction contract – Works – Construction work contracts to which Government is party – Whether construction work contracts included in list of categories of contracts set out in Schedule to Part II of Temporary Measures for Reducing The Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ('Covid-19 Act') – Whether Covid-19 Act applicable – Whether elements of s. 7 of Covid-19 Act established*

The defendant, through the Public Works Department Malaysia ('PWD'), had accepted the plaintiff's tender to carry out the works for a project for the contract sum of RM67,765,800. The date of the site possession was 7 September 2017 with a construction period of 78 weeks and the completion date of the project was 6 March 2019. The plaintiff provided a performance bond ('PB') to the defendant as issued by AmBank Islamic Berhad ('AmBank') for the sum of RM3,388,290. The PB was amended to extend the expiry date of the PB until the final expiry date of 20 June 2022. Following disputes between parties, the plaintiff issued three notices of dispute to the defendant to refer the matter to the Deputy Director General of the PWD. Despite complications, the plaintiff averred that its work progress was 93.25% as at 12 October 2020. The defendant in turn issued the certificate of delay and extension of time ('EOT') and the certificate of non-completion ('CNC'). Another CNC was issued by the defendant for the plaintiff's failure to complete the project on 23 January 2020. According to the defendant, EOT No. 4, was granted in line with the policy of the Government of Malaysia ('Government') in view of the imposition of the Movement Control Orders ('MCOs'). In total, four EOTs were approved involving a total of 407 days. A notice specifying the plaintiff's default and giving it 14 days to remedy the same under cl. 51.1(a) of the contract was

eventually issued by the defendant. This was followed by letters of appeals by the plaintiff whereby among the matters highlighted was the impact of the Covid-19 pandemic and the implementation of the MCOs on the construction industry in general and on the progress of the project in particular. However, the plaintiff's appeals were rejected and the defendant proceeded to issue the notice of termination. The defendant claimed that the notice of termination was not served in accordance with the contract as it was merely e-mailed. A stop work order and instruction to vacate the project site were also sent by the defendant to the plaintiff. The plaintiff believed that the call on the PB was made before the termination of the contract and claimed that the said call and the termination of the contract was tainted with procedural impropriety and *mala fide* on the part of the defendant. Hence, the plaintiff sought an interim injunction on the ground of unconscionability as there were real risks that the plaintiff may suffer irreparable prejudice from the calling of the PB and the termination of the contract. The issues that arose were: (i) the plaintiff's application pursuant to ss. 8 and 9 and para. 11(1)(a) of the Arbitration Act 2005 ('Act'); (ii) whether the court could grant an interim and/or permanent injunction as sought by the plaintiff; (iii) whether construction work contracts to which the Government was a party was included in the list of categories of contracts as set out in the Schedule to Part II of the Temporary Measures for Reducing The Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 ('Covid-19 Act'); and (iv) if the Covid-19 Act was applicable, whether (a) the plaintiff had established the elements of s. 7; and (b) the facts fell within the saving clause in s. 10.

Held (dismissing applications):

(1) The plaintiff had not adduced sufficient evidence to fulfil the requirement that the interim relief must support, assist, aid and/or facilitate the proposed arbitral proceedings. All that the plaintiff submitted was that, whilst the matter was to be heard in arbitration, the call on the PB must be frozen, or else, the damage on the plaintiff might be irreparable. (para 34)

(2) The interim measure sought under para. 11(1)(a) and (c) of the Act was, in essence, an injunction against the Government and its officer(s). Thus, the issue as to whether the court could grant an injunction, remained a material and relevant consideration. Following the court's conclusion in *Dhaya Maju LTAT Sdn Bhd v. Kerajaan Malaysia & Anor,* the court was 'bound by the decision of the apex court in *Government Of Malaysia v. Lim Kit Siang & Another Case* that no injunction can be directly or indirectly issued against the Government or its officers'. In so far as the decisions by the Court of Appeal is concerned, this court would opt to follow the clear pronouncement in the later decision in *Tan Bun Teet & Ors v. Menteri Sains, Teknologi Dan Inovasi Malaysia & Ors* that an interim,

interlocutory or permanent injunction cannot be granted against the Government under s. 29 of the Government Proceedings Act 1956 and s. 54 of the Specific Relief Act 1950, the answer to the second issue was in the negative. (paras 47 & 48)

(3) Seven categories of contracts were specified in the Schedule to Part II of the Covid-19 Act. There was no express provision in the Covid-19 Act which states that it is to apply to construction contracts and/or construction work contracts entered into by the Government. In the absence of such express provision, the next question which arose for determination was whether the Covid-19 Act was applicable to such Government contracts by necessary implication. If Parliament had intended to include Government construction work contracts in item 1 in the list of categories of contracts as set out in the Schedule for the purposes of s. 7 of the Covid-19 Act, it would have provided words to that effect in the Schedule to Part II of the Covid-19 Act. By not having done so, Government construction work contracts were not meant to be covered by necessary implication. (paras 57, 58, 60 & 78)

(4) The plaintiff failed to establish the requirements of s. 7 of the Covid-19 Act. A party could not simply invoke s. 7 of the Covid-19 Act just because the country was experiencing a pandemic and that there have been MCOs in force to curb the spread of the disease. The situation plaguing the nation, in general, and the plaintiff as a contractor for the project, in particular, did not relieve the plaintiff from the burden of proving, on a balance of probabilities that (i) it was unable to perform any contractual obligation whereby the precise duty or duties under contract should be specified; (ii) the inability to perform the contractual obligation arose from one of the categories of contracts as listed in the Schedule to Part II of the Covid-19 Act; and (iii) the inability to perform the contractual obligation was due to the measures prescribed, made or taken under Prevention and Control of Infectious Discases Act 1988 ('Act 342') to control or prevent the spread of Covid-19. The precise measure as prescribed, made or taken under Act 342 must be identified and the nexus between the said measure and the plaintiff's inability to perform its contractual obligation(s) must be demonstrated. (para 80)

Case(s) referred to:

Business Leap (M) Bhd v. Pesuruhjaya Tanah Persekutuan & Ors [2018] 1 LNS 400 HC ***(refd)***

Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor [2020] 3 CLJ 593 FC ***(refd)***

Dhaya Maju LTAT Sdn Bhd v. Kerajaan Malaysia & Anor [2021] 2 CLJ 897 HC ***(refd)***

Dr Koay Cheng Boon v. Majlis Perubatan Malaysia [2012] 4 CLJ 445 FC ***(refd)***

Estate Trust Agencies (1927) Ltd v. Sim Teng Chew [1947] 1 LNS 22 HC ***(refd)***

Government Of Malaysia v. Lim Kit Siang & Another Case [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63 SC ***(refd)***

Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd [2003] 3 CLJ 378 CA ***(refd)***

Layar Baiduri Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2020] 1 CLJ 884 HC ***(refd)***

Lim Kit Siang v. United Engineers (M) Bhd & Ors [1987] 2 CLJ 195; [1987] CLJ (Rep) 170 SC ***(refd)***

Lord Advocate v. Dumbarton District Council [1990] 2 AC 580 ***(refd)***

Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd [2008] 5 CLJ 321 FC ***(refd)***

Moore v. Smith [1859] 5 Jur NS 892 ***(refd)***

Muniandy Subramanian & Ors v. Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor [2003] 4 CLJ 123 HC ***(refd)***

Ong Bee Yam v. Pengarah Hasil Dalam Negeri, Sarawak & Anor [2002] 3 MLJ 389 ***(refd)***

PWC Bina Sdn Bhd v. Kerajaan Malaysia & Anor [2016] 1 LNS 1233 HC ***(refd)***

R (on the application of Black) v. Secretary of State for Justice [2017] UKSC 81 ***(refd)***

RZH Setia Jaya Sdn Bhd v. Kerajaan Malaysia [2020] 1 LNS 1854 HC ***(refd)***

Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors [2005] 2 CLJ 122 CA ***(refd)***

Superintendent Of Land And Surveys, Bahagian Mukah & Anor v. Bunyak Gadin & Ors And Another Appeal [2016] 5 CLJ 558 CA ***(refd)***

Superintendent Of Lands And Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd [2009] 6 CLJ 751 CA ***(refd)***

Tan Bun Teet & Ors v. Menteri Sains, Teknologi Dan Inovasi Malaysia & Ors [2013] 3 CLJ 1115 CA ***(foll)***

Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors [2002] 2 CLJ 758 HC ***(refd)***

Tebin Mostapa v. Hulba-Danyal Balia & Anor [2020] 7 CLJ 561 FC ***(refd)***

Tengku Hj Jaafar & Anor v. Government Of The State Of Pahang [1977] 1 LNS 139 HC ***(refd)***

The Province Of Bombay v. The Municipal Corporation Of The City Of Bombay And Another [1947] AC 58 ***(refd)***

Legislation referred to:

Arbitration Act 2005, ss. 8, 9, 11(1)(a), (c)
Construction Industry Payment and Adjudication Act 2012, s. 2
Government Proceedings Act 1956, s. 29
Interpretation Acts 1948 and 1967, s. 63
Islamic Banking Act 1983 (repealed), s. 2
Islamic Financial Services Act 2013, s. 282
Rules of Court 2012, O. 29 rr. 1(2), (2A), (2B), (2BA), 2, 5, 8, O. 31 r. 1
Specific Relief Act 1950, ss. 41, 50, 51, 54(d)
Temporary Measures for Reducing The Impact of Coronavirus Disease 2019 (Covid-19) Act 2020, ss. 1(2), (3), 2, 4, 5, 6, 7, 10, Schedule item 1

Other source(s) referred to:

Datuk Professor Sundra Rajoo & Dr Thomas R Klötzel, *UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 (Amended 2011 & 2018) and the AIAC Arbitration Rules,* Sweet & Maxwell, 2019, p 209

For the plaintiff - Yusman Mohd Badar & Muhammad Nazmi Hanafi; M/s Chambers of Yusman Azlin Anwar

For the defendant - Zureen Elina Mohd Dom & Aida Mastura Mohamed Aman; SFCs & Khong Hui Li; FC

Reported by Lina E

JUDGMENT

Aliza Sulaiman J:

Introduction

[1] The applications by the plaintiff raise the novel issue as to whether construction work contracts to which the Government is a party is included in the list of categories of contracts as set out in the Schedule to Part II of the Temporary Measures for Reducing The Impact of Coronavirus Disease 2019 (Covid-19) Act 2020 (Act 829) ('Covid-19 Act') and the not so new issue on whether an interim injunction can be granted against the Government or its officers.

[2] By consent of the parties, two applications by the plaintiff were heard together and these are:

(i) the application in the originating summons ('OS') in encl. 1 for, among others, the following orders against the defendant:

1. Suatu Perintah bahawa Plaintif dibenarkan untuk suatu pemeliharaan dan jagaan interim harta yang menjadi hal pertikaian antara Plaintif dan Defendan dengan Defendan sebagai benefisiari asal dan/atau Jabatan Kerja Raya (JKR) Malaysia ditegah dari memanggil/menunaikan Jaminan Bank bagi Jaminan Perlaksanaan (Performance Bond) berjumlah RM3,388,290.00 melalui No. T807171BG2006720 bertarikh 23.11.2017 yang dikeluarkan oleh AmBank Islamic Berhad (295576-U) beserta Pindaan No 1 bertarikh 25.2.2019, Surat Pindaan No 2 bertarikh 19.7.2019, Surat Pindaan No 3 bertarikh 5.9.2019, Surat Pindaan No 4 bertarikh 23.12.2019 dan Surat Pindaan No 5 bertarikh 1.7.2020 berkaitan projek yang diberikan oleh Defendan kepada Plaintif yang bertajuk 'Cadangan Menyiapkan Kerja-Kerja Terbengkalai di Hospital (40 Katil), Bera, Pahang, (Pakej 2 – Kerja Bangunan dan Lain-Lain Kerja Berkaitan)' berjumlah RM67,785,800.00 melalui Surat Setuju Terima Tender bertarikh 17.8.2017 dan Perjanjian Dokumen Kontrak antara Kerajaan Malaysia melalui PWD Form 203A Syarat-Syarat Kontrak (Rev 1/2010) sebagai 'Dokumen Kontrak' ('Kontrak') yang ditamatkan oleh Defendan melalui Notis Penamatan bertarikh 12.10.2020 sehingga prosiding arbitrasi di dalam prosiding yang diniatkan itu dilupuskan.

2. Suatu injunksi atau langkah-langkah interim yang berpatutan dengan menghalang Defendan dan/atau Jabatan Kerja Raya (JKR) Malaysia sama ada dengan sendirinya atau sama ada oleh pegawainya, pekerjanya, wakil sah, agennya dan oleh mana-mana pihak yang ada kaitan dengannya hendaklah ditegah secara injunksi interim daripada menunaikan Jaminan Bank tersebut atau apa-apa jumlah daripadanya pada bila-bila masa bagi mengekalkan *status quo* sebelum pertikaian menurut bidang kuasanya sehingga prosiding arbitrasi yang diniatkan itu dilupuskan.

A 3. Ganti rugi am yang ditaksirkan Mahkamah Yang Mulia ini

4. Ganti rugi khas yang ditaksirkan Mahkamah Yang Mulia ini

…,

wherein the provisions cited in the intitulement are ss. 8 and 9 and
B para. 11(1)(a) of the Arbitration Act 2005 (Act 646) ('AA 2005'), s. 41 of the Specific Relief Act 1950 (Act 137) ('SRA 1950') and O. 29 rr. 1, 2, 5, and 8 and O. 31 r. 1 of the Rules of Court 2012 ('RoC 2012'); and

(ii) the *ex parte* application in encl. 4 pursuant to O. 29 rr. 1(2), (2A), (2B) and (2BA) of the RoC 2012, which was subsequently heard on an *inter*
C *partes* basis, for *inter alia*, the following orders against the defendant:

(i) Defendan samada dengan sendirinya dan/atau melalui Ketua Pengarah Kerja Raya, Jabatan Kerja Raya Malaysia (JKR) samada oleh pegawainya, pekerjanya, wakil sah, agennya dan oleh mana-
D mana pihak yang ada kaitan dengannya ditegah secara injuksi interim daripada memanggil/menunaikan Jaminan Bank bagi Jaminan Pelaksanaan No. T807171BG2006720 bertarikh 23.11.2017 yang dikeluarkan oleh Ambank Islamic Berhad (295576-U) berjumlah RM3,388,290.00 beserta Pindaan No 1 bertarikh 25.2.2019, Surat Pindaan No 2 bertarikh 19.7.2019, Surat Pindaan No 3 bertarikh 5.9.2019, Surat Pindaan No 4 bertarikh 23.12.2019
E dan Surat Pindaan No 5 bertarikh 1.7.2020 ('Performance Bond') yang telah atau akan dipanggil oleh Defendan pada bila-bila masa bagi suatu pemeliharaan harta interim dengan serta-merta ("forthwith") selepas penyampaian Perintah ini;

(ii) Defendan dengan sendirinya dan/atau melalui Ketua Pengarah
F Kerja Raya, Jabatan Kerja Raya (JKR) Malaysia samada melalui pegawainya, pekerjanya, ejen sahnya, wakilnya atau kakitangannya ditegah secara injuksi interim daripada terus berurusan dengan Ambank Islamic Berhad bagi tujuan menunaikan Jaminan Bank Performance Bond tersebut bagi mengekalkan *status quo* sebelum pertikaian Plaintif terhadap Defendan diselesaikan menurut
G bidangkuasa arbitrasi

…

[3] After having fully considered the cause papers and written submissions filed in court and the oral submissions by Mr. Yusman Mohd. Badar who
H appeared for the plaintiff and Senior Federal Counsel ('SFC') Zureen Elina Hj. Mohd Dom for the defendant, I had dismissed the plaintiff's application in encls. 1 and 4 with costs of RM6,500 for each application.

[4] Being dissatisfied, the plaintiff has filed a single notice of appeal against the decision of the court in respect of both applications.

I **[5]** The full grounds for the decision are elaborated below.

Salient Facts

[6] By a Surat Setuju Terima Tender dated 17 August 2017 ('SST'), the defendant, through the Public Works Department Malaysia ('PWD'), had accepted the plaintiff's tender to carry out the works for the project known as "Menyiapkan Kerja-Kerja Terbengkalai di Hospital (40 Katil), Bera, Pahang, (Pakej 2 – Kerja Bangunan dan Lain-Lain Kerja Berkaitan)" ('project') for the contract sum of RM67,765,800 as stipulated in para. 3 of the SST.

[7] Paragraphs 8 and 12 of the SST provide that the date of site possession is 7 September 2017 with a construction period of 78 weeks and the completion date of the project is 6 March 2019.

[8] The conditions of contract are based on the Standard Form Of Contract To Be Used Where Bills Of Quantities Form Part Of The Contract P.W.D. Form 2013A (Rev. 1/2010) ('contract'). The contract was executed by the parties on 12 December 2017.

[9] In accordance with para. 6 of the SST and cl. 13.1 of the contract, the plaintiff provided a performance bond ('PB') to the defendant as issued by AmBank Islamic Berhad ('AmBank Islamic') on 23 November 2017 for the sum of RM3,388,290 and effective until 5 March 2021. The PB was amended *vide* Amendment Nos. 1 to 5 on 25 February 2019, 19 July 2019, 5 September 2019, 23 December 2019 and 1 July 2020 to extend the expiry date of the PB until the final expiry date of 20 June 2022. The parties do not dispute that the PB is an unconditional on-demand bond (see para. 1 of the PB).

[10] Throughout the construction period, the parties faced the common challenges and problems in any project. As the contractor, the plaintiff alleged that it faced, among others, technical on-site issues, rejection of the applications for extension of time ('EoT'), warnings being issued by the defendant although the defendant itself failed to resolve many outstanding matters and payment-related problems.

[11] Following the disputes between the parties regarding the issues relating to the electrical remedial works and price adjustments to contract no. 3, the plaintiff had issued three notices of dispute dated 9 March 2019, 26 December 2019 and 26 February 2020 to the defendant pursuant to cl. 66.1 of the contract to refer the matter to the Deputy Director General of the PWD.

[12] Despite these complications, the plaintiff averred that its work progress was 93.25% as at 12 October 2020.

[13] The defendant in turn issued the certificate of delay and EoT nos. 1, 2 and 3 on 17 December 2018 (for 148 days from 7 March 2019 to 1 August 2019), 25 July 2019 (for 142 days from 2 August 2019 to 21 December 2019) and 13 January 2020 (for 33 days from 22 December 2019 to 23 January 2020), respectively.

[14] On 20 December 2019, the defendant issued the certificate of non-completion ('CNC') of the works by the extended completion date of 21 December 2019 and the intention to impose liquidated and ascertained damages in the sum of RM12,346.37 per day pursuant to cl. 40 of the contract. Another CNC dated 24 January 2020 was issued by the defendant for the plaintiff's failure to complete the project on 23 January 2020.

[15] According to the defendant, EoT No. 4 on 23 June 2020 for 84 days from 18 March 2020 to 9 June 2020 was granted in line with the policy of the Government of Malaysia ('Government') in view of the imposition of the Movement Control Orders ('MCO'). In total, four EoT were approved involving a total of 407 days.

[16] A notice specifying the plaintiff's default and giving it 14 days to remedy the same under cl. 51.1(a) of the contract was eventually issued by the defendant on 14 August 2020. This was followed by letters of appeals by the plaintiff dated 1 September 2020 and 4 September 2020 whereby among the matters highlighted was the impact of the Covid-19 pandemic and the implementation of the MCO on the construction industry, in general, and on the progress of the project, in particular.

[17] However, the plaintiff's appeals were rejected, and the defendant proceeded to issue the notice of termination dated 12 October 2020 pursuant to cl. 51.1(a)(iii) and 51.1(b) of the contract. In para. 6 of the notice of termination, the defendant stated that "Rampasan terhadap Bon Pelaksanaan adalah dibuat sejajar dengan Fasal 13.6 Syarat-Syarat Kontrak".

[18] The plaintiff claimed that the notice of termination was not served in accordance with the contract as it was merely e-mailed by the defendant on 14 October 2020.

[19] A stop work order and instruction to vacate the project site dated 13 October 2020 was also sent by the defendant to the plaintiff.

[20] The OS, notice of application (*ex parte*), two affidavits in support ('AIS') and certificate of urgency were filed simultaneously by the plaintiff on 26 October 2020 (encls. 1, 4, 2, 5 and 6, respectively).

[21] In its additional affidavit affirmed on 27 October 2020 (encl. 8), the plaintiff confirmed that it had received the defendant's letter addressed to AmBank Islamic dated 19 October 2020 to call on the PB ('19 October 2020 letter'). The plaintiff averred that AmBank Islamic received the 19 October 2020 letter on 27 October 2020 but this was denied by the defendant.

[22] The plaintiff believes that the call on the PB was made before the termination of the contract and claimed that the said call and the termination of the contract was tainted with procedural impropriety and *mala fide* on the part of the defendant.

[23] Hence, the plaintiff sought an interim injunction on the ground of unconscionability as there are real risks that the plaintiff may suffer irreparable prejudice from the calling of the PB and termination of the contract.

The Issues

First Issue: The Plaintiff's Application Pursuant To Sections 8 And 9 And Para. 11(1)(a) Of The AA 2005

The Parties' Submissions

[24] The plaintiff referred to cl. 66 in the contract in contending that the clause is an arbitration agreement between the parties and as such, the plaintiff has applied to this court for an interim measure, specifically pursuant to para. 11(1)(a) of the AA 2005, to maintain or restore the *status quo* pending the determination of the dispute between the parties in the arbitration.

[25] In the course of his submission for the plaintiff, Mr. Yusman had additionally referred to para. (c) of sub-s. 11(1) AA 2005 as the basis in seeking for an order to provide a means of preserving asset out of which a subsequent award may be satisfied for an extreme urgency as explained in the AIS. It was argued that the plaintiff believes it has a cause of action against the defendant; the arbitration agreement is still valid; the relief sought is interim in nature and is meant to support, assist and facilitate the proposed arbitral proceeding; and is not meant to deter the commencement of an arbitration at any time.

[26] SFC Zureen Elina countered that there is no ambiguity about the prayer sought by the plaintiff which is basically for an interim injunction against the Government to stop the Government from accepting payment under, or calling on, the PB pending a final determination by way of arbitration. However, the immediate question which arises is whether the court has jurisdiction to grant an injunction against the defendant being the Government.

The Views Of The Court

[27] As a matter of initial observation, the provisions on which the plaintiff is moving the court to make the orders prayed for in encl. 1 are only found in the intitulement of the OS.

[28] As for encl. 4, whilst ss. 8 and 9 and para. 11(1)(a) of the AA 2005 are cited in the intitulement, the body of the notice of application makes reference to O. 29 r. 1 RoC 2012 which governs the application for an interlocutory injunction. Further, the words "bagi suatu pemeliharaan harta interim dengan serta-merta selepas penyampaian perintah ini" in prayer (i) and "bagi mengekalkan *status quo* sebelum pertikaian plaintif terhadap defendan diselesaikan menurut bidang kuasa arbitrasi" in prayer (ii) appear to suggest that the plaintiff is invoking paras. (a) and (c) of sub-s. 11(1) AA 2005.

[29] However, since the defendant has not raised any objections on the abovementioned matters and a perusal of the defendant's sole affidavit (encl. 19) and the written submissions (encls. 15, 22 and 27) shows that the defendant knows exactly the case that it has to meet, nothing more needs to be said about the irregularities as observed.

[30] Moving on to ss. 8 and 9 and paras. 11(1)(a) and (c) of the AA 2005, these provisions are re-produced below for ease of reference:

Extent of court intervention

8. No court shall intervene in matters governed by this Act, except where so provided in this Act.

Definition and form of arbitration agreement

9(1) In this Act, "arbitration agreement" means an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

(2) An arbitration agreement may be in the form of an arbitration clause in an agreement or in the form of a separate agreement.

(3) An arbitration agreement shall be in writing.

(4) An arbitration agreement is in writing:

(a) if its content is recorded in any form, whether or not the arbitration agreement or contract has been concluded orally, by conduct, or by other means; or

(b) if it is contained in an exchange of statement of claim and defence in which the existence of an agreement is alleged by one party and not denied by the other.

(4A) The requirement that an arbitration agreement be in writing is met by any electronic communication that the parties make by means of data message if the information contained therein is accessible so as to be useable for subsequent reference.

(5) A reference in an agreement to a document containing an arbitration clause shall constitute an arbitration agreement, provided that the agreement is in writing and the reference is such as to make that clause part of the agreement.

…

Section 11. Arbitration agreement and interim measures by High Court

(1) A party may, before or during arbitral proceedings, apply to a High Court for any interim measure and the High Court may make the following orders for the party to:

(a) maintain or restore the *status quo* pending the determination of the dispute;

…

(c) provide a means of preserving assets out of which a subsequent award may be satisfied, whether by way of arrest of property or bail or other security pursuant to the admiralty jurisdiction of the High Court;

…

[31] After having scrutinised prayers 1 and 2 in encl. 1 and prayers (i) and (ii) in encl. 4 together with the plaintiff's averments in the affidavits and its submissions, it is evident that the plaintiff is not only moving this court under ss. 8 and 9 and paras. 11(1)(a) and (c) of the AA 2005, but the interim measure sought is, in essence, an interim injunction to restrain the Government and/or the Director General of the PWD or his officers, employees, authorised representatives or agents from calling on the PB or from dealing with AmBank Islamic for purposes of calling on the PB so as to maintain the *status quo* pending the determination of the dispute between the parties by way of arbitration and/ or to preserve the assets in the form of the PB out of which the plaintiff claims a subsequent award may be satisfied.

[32] As submitted by the learned SFC, this would naturally lead to the question which has been framed as the second issue to be examined below.

[33] Before leaving the issue on interim measures, it is pertinent to note the following excerpt from *UNCITRAL Model Law & Arbitration Rules: The Arbitration Act 2005 (Amended 2011 & 2018)* and the *AIAC Arbitration Rules* by Datuk Professor Sundra Rajoo & Special Contributor Dr. Thomas R. Klötzel, Sweet & Maxwell, 2019 at p 209:

11.25 The High Court in *Bumi Armada Navigation Sdn Bhd v. Mirza Marine Sdn Bhd*, set out the five principles applicable to the granting of an interim measure prior to the commencement of arbitral proceedings:

a) the applicant must have a cause of action against the party whom interim relief is sought: *Khoo Soo Teong v. Khoo Siew Ghim & Anor* [1991] 3 MLJ 158 at 159;

b) there must be an "arbitration agreement" as understood in subsection 2(1) and 9(1) to (5) of the (AA 2005);

c) the relief sought must be interim in nature and cannot be permanent in effect: *Metrod (Singapore) Pte Ltd v. GEP II Beteiligungs Gmbh & Anor* [2013] MLJU 602;

d) the interim relief must support, assist, aid and/or facilitate the proposed arbitral proceedings: *Metrod (Singapore) Pte Ltd* …; and

e) arbitral proceedings should be commenced within a reasonable time of the interim orders being issued.

11.26 The above principles continue to be of relevance given that the amended section 11(1) of the AA 2005 does not restrict a party's right to seek interim measures prior to the commencement of arbitral proceedings.

[34] At the outset, it must be made clear that even if I am found to have erred in my analysis and conclusions on the other issues as discussed below, based on my perusal of the affidavit evidence, I am of the opinion that the plaintiff has not adduced sufficient evidence to fulfil the requirement that the interim relief must support, assist, aid and/or facilitate the proposed arbitral proceedings. All that the plaintiff submitted was that whilst the matter is to be heard in arbitration, the call on the PB must be frozen or else the damage on the plaintiff might be irreparable.

Second Issue: Whether The Court Can Grant An Interim And/Or Permanent Injunction As Sought By The Plaintiff

The Parties' Submissions

[35] First and foremost, learned plaintiff's counsel and SFC have relied on familiar case authorities whenever the issue as to whether an injunction, whether permanent or otherwise, can be granted against the Government and/or its officer(s).

[36] The common case authority cited by both Mr. Yusman and SFC Zureen Elina is *Government Of Malaysia v. Lim Kit Siang & Another Case* [1988] 1 CLJ 219; [1988] 1 CLJ (Rep) 63; [1988] 2 MLJ 12. The plaintiff had additionally referred to *Tengku Hj Jaafar & Anor v. Government Of The State Of Pahang* [1977] 1 LNS 139; [1977] 1 MLRH 120; *Lim Kit Siang v. United Engineers (M) Bhd & Ors* [1987] 2 CLJ 195; [1987] CLJ (Rep) 170; [1987] 1 MLRA 28; *Kekatong Sdn Bhd v. Danaharta Urus Sdn Bhd* [2003] 3 CLJ 378; [2003] 1 MLRA 338; *Muniandy Subramanian & Ors v. Majlis Perbandaran Langkawi Bandaraya Pelancongan & Anor* [2003] 4 CLJ 123; [2003] 6 MLJ 177; *Sabil Mulia (M) Sdn Bhd v. Pengarah Hospital Tengku Ampuan Rahimah & Ors* [2005] 2 CLJ 122; [2004] 2 MLRA 583; *Minister Of Finance, Government Of Sabah v. Petrojasa Sdn Bhd* [2008] 5 CLJ 321; [2008] 1 MLRA 705; *PWC Bina Sdn Bhd v. Kerajaan Malaysia & Anor* [2016] 1 LNS 1233; *Datuk Seri Anwar Ibrahim v. Government Of Malaysia & Anor* [2020] 3 CLJ 593; [2020] 2 MLRA 1 whilst the defendant had relied on the decisions

in *Tan Sri Dato' Tajuddin Ramli v. Pengurusan Danaharta Nasional Bhd & Ors* [2002] 2 CLJ 758; [2002] 5 MLJ 720; *Superintendent Of Lands And Surveys, Kuching Division & Ors v. Kuching Waterfront Development Sdn Bhd* [2009] 6 CLJ 751; *Tan Bun Teet & Ors v. Menteri Sains, Teknologi Dan Inovasi Malaysia & Ors* [2013] 3 CLJ 1115; *Superintendent Of Land and Surveys, Bahagian Mukah & Anor v. Bunyak Gadin & Ors And Another Appeal* [2016] 5 CLJ 558; *Business Leap (M) Bhd v. Pesuruhjaya Tanah Persekutuan & Ors* [2018] 1 LNS 400; and *Layar Baiduri Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2020] 1 CLJ 884.

[37] Basically, the plaintiff sought an interim injunction against the defendant to prevent the Government from accepting payment under, or calling on, the PB pending a final determination by way of arbitration. It was contended that the facts in *Lim Kit Siang*'s case and *Muniandy*'s case can be distinguished from the facts in the instant case on the ground that the individuals in those two cases did not have a valid contract with the Government whereas the plaintiff here clearly does.

[38] Predictably, the defendant cited s. 29 of the Government Proceedings Act 1956 (Act 359) ('GPA 1956') and s. 54 of the SRA 1950 as having the effect of expressly and effectively limiting the court's jurisdiction in the granting of an injunction against the defendant. The SFC strongly argued, with reference to the case authorities which she had cited, that both s. 29 GPA 1956 and s. 54 SRA 1950 prevent an injunction from being granted against the defendant, whether permanent or interim in nature.

[39] In addition, during oral submission, the SFC mentioned that the Court of Appeal had decided in *RZH Setia Jaya Sdn Bhd v. Kerajaan Malaysia*, Appeal No. W-01-(C)(A)422-09-2020 to affirm the decision of the High Court (see [2020] 1 LNS 1854) in dismissing the plaintiff's application for an injunction against the Government from receiving any payment under a performance bond. The SFC argued that the legal position as laid down in *Kuching Waterfront Developmen*t, *Tan Bun Teet* and *Bunyak Gadin* that an interim injunction does not lie against the Government or its officer is thereby maintained.

[40] The SFC emphasised that strict adherence to this legal position is essential to protect the integrity and uninterrupted operations of governmental functions and that if the plaintiff's application is allowed, this will open the floodgates as every party who finds itself being terminated under a Government contract will dispute the termination and seek an injunction against the Government pending arbitration proceedings, which could potentially be a protracted process.

The Findings Of The Court

[41] For the sake of convenience of reference and completeness, the relevant statutory provisions, including s. 41 SRA 1950 which appears in the intitulement of encls. 1 and 4, are set out below:

s. 29 GPA 1956:

Nature of relief

29(1) In any civil proceedings by or against the Government the court shall, subject to this Act, have power to make all such orders as it has power to make in proceedings between subjects, and otherwise to give such appropriate relief as the case may require:

Provided that:

(a) where in any proceedings against the Government any such relief is sought as might in proceedings between subjects be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may *in lieu* thereof make an order declaratory of the rights of the parties; and

(b) …

(2) The court shall not in any civil proceedings grant any injunction or make any order against an officer of the Government if the effect of granting the injunction or making the order would be to give any relief against the Government which could not have been obtained in proceedings against the Government.

Sections 41, 50, 51 and 54 SRA 1950:

Discretion of court as to declaration of status or right

41. Any person entitled to any legal character, or to any right as to any property, may institute a suit against any person denying, or interested to deny, his title to the character or right, and the court may in its discretion make therein a declaration that he is so entitled, and the plaintiff need not in that suit ask for any further relief:

Provided that no court shall make any such declaration where the plaintiff, being able to seek further relief than a mere declaration or title, omits to do so.

PART III

PREVENTIVE RELIEF

CHAPTER IX

OF INJUNCTIONS GENERALLY

Preventive relief how granted

50. Preventive relief is granted at the discretion of the court by injunction, temporary or perpetual.

Temporary and perpetual injunctions

51(1) Temporary injunctions are such as are to continue until a specified time, or until the further order of the court. They may be granted at any period of a suit, and are regulated by the law relating to civil procedure.

(2) A perpetual injunction can only be granted by the decree made at the hearing and upon the merits of the suit;

CHAPTER X

OF PERPETUAL INJUNCTIONS

Injunction when refused

54. An injunction cannot be granted:

…

(d) to interfere with the public duties of any department of any Government in Malaysia, …;

[42] The statutory provisions as above stated and the cases as set out in para. 36 above, with the exception of *Lim Kit Siang v. United Engineers* [1987] 1 MLRA 28, *Datuk Seri Anwar Ibrahim* and *RZH Setia Jaya* were considered in the judgment of this court in *Dhaya Maju LTAT Sdn Bhd v. Kerajaan Malaysia & Anor* [2021] 2 CLJ 897; [2021] 8 MLJ 618.

[43] After having read the written submissions filed by the parties and having heard the oral submissions by learned counsel for the plaintiff and SFC for the defendant, I found that there is nothing in the plaintiff's contentions and arguments to persuade me from taking a different view from that which was expressed in *Dhaya Maju*.

[44] For present purposes, suffice for me to quote the following excerpts from para. 46 in the judgment in *Dhaya Maju*'s case:

(i) in respect of the plaintiff's reliance on *Petrojasa*'s case, that:

(e) Even though the Plaintiff argued that the Federal Court in *Petrojasa* need not refer to *Sabil Mulia* at all and by doing so, the Court had accepted the view in *Sabil Mulia*, the Court of Appeal in para 18 of the judgment in *Kuching Waterfront* opined that the passage in question (as quoted in para 35 above) is *obiter* in nature and Arifin Zakaria FCJ's (as he then was) views were "merely targeting the tendencies of courts in certain situations". Indeed, His Lordship explicitly stated that the issue before the Federal Court is not the same as, or similar to, the issue before the panel of judges in *Sabil Mulia viz*. "That is not the issue before us …".

Apart from the case of *Sabil Mulia*, no other key decisions on the issue as to whether an interim or interlocutory injunction lies against the Government or its officers were analysed or discussed in *Petrojasa*. *Petrojasa* is not among the cases that were considered in *Tan Bun Teet*. In the circumstances, I am not prepared to go as far as to say that the Federal Court has endorsed the *ratio* in *Sabil Mulia* that s. 29 GPA 1956 does not prohibit the grant of temporary injunctions against the Government, and by doing so, has chosen to depart from the majority view in *UEM*'s case;

(ii) in respect of *PWC Bina*'s case, that:

> (j) In *PWC Bina*, the High Court alluded to the approach taken by the High Court in *Yap Piew Chuan v. Araca Enterprise Sdn Bhd* [1998] 2 CLJ 234 in the situation where there is a conflict of two decisions of the Court of Appeal, namely that the High Court is free to follow either one (see too, the discussion by the apex court in *Dalip Bhagwan Singh v. Public Prosecutor* [1998] 1 MLJ 1 on, among others, the doctrine of *stare decisis*; the exceptions affecting especially the Court of Appeal; and the statement that "When two decisions of the Federal Court conflict on a point of law, the later decision therefore … prevails over the earlier decision." at (pp 12-14).
>
> With due respect, I am not persuaded to take the same course as the Court in *PWC Bina* in view of the fact that, after the judgment of the majority in *UEM*'s case, the then Supreme Court and later, the Federal Court, have not specifically departed from the said judgment. As "highly controversial" as *UEM*'s case may be due to the "vigorous dissenting judgments" which supposedly reflects the correct proposition of the law as contended by the Plaintiff's counsel, there is no other decision by the highest court of this country which have given a different interpretation to s. 29 GPA 1956 than that in *UEM*'s case. Besides, with the firm pronouncement in *Tan Bun Teet*, being a later decision of the Court of Appeal, that an injunction, whether interim, interlocutory or permanent, cannot be granted against the Government under s. 29 GPA 1956 and s. 54 SRA 1950, this Court is bound by the doctrine of *stare decisis* (see paras 49-54 in the judgment of the Federal Court in *Kerajaan Malaysia & Ors v. Tay Chai Huat* [2012] 3 MLJ 149 at pp. 170-172) to similarly hold that an injunction cannot lie against the Government or its officer [see also the views expressed by Wan Ahmad Farid Wan Salleh JC (as His Lordship then was) in paras 21 and 22 in *Business Leap* (*supra*)]; and

(iii) in respect of the decisions in *Kuching Waterfront* and *Tan Bun Teet*, that:

> (g) The expansive scope of the judgment in *Kuching Waterfront* on the current issue that is being examined is further strengthened by another decision of the Court of Appeal. In *Tan Bun Teet*, the Court followed *UEM*'s case and referred to *Kuching Waterfront*. Azhar Mohamed JCA (now CJM) at pp 1128-1129 wrote:
>
> > [14] … *An injunction, interim/interlocutory or permanent, cannot be granted against the government under s. 29 of the GPA and under s. 54 of the SPA. The authority to support this proposition can be found in the decision of our then Supreme Court in Lim Kit Siang v. United Engineers (M) Bhd & Ors* …
> >
> > [15] *The principle of law enunciated above has been reaffirmed by the Court of Appeal in … Kuching Waterfront …*

> [16] It follows from this, …, if the relief sought is granted, this will interfere with the public duty of the 2nd respondent under the AELA and as such, s. 29 of the GPA protects the second respondent, being a public authority, from any form of injunctive orders. (emphasis added)
>
> Thus, it appears that notwithstanding the comment by the Court in *Sabil Mulia* that the acceptance of Salleh Abas LP's view in *UEM*'s case by the High Court in *Muniandy a/l Subramaniam* (*supra*; at pp. 183-184) was done "without any proper appreciation or evaluation of the jurisprudential worth of that view", the Court in *Kuching Waterfront* and *Tan Bun Teet* have cited *UEM*'s case as authority to support the finding that s. 29 GPA 1956 prohibits the granting of all types of injunction, whether temporary or perpetual, against the Government.

[45] As for the case of *Datuk Seri Anwar Ibrahim*, Mr. Yusman quoted the following excerpt from the judgment by Nallini Pathmanathan FCJ in submitting that the concept of public vs. private litigation had influenced the decision of the esteemed panel of judges in *Lim Kit Siang*'s case:

> [163] I am aware that in *Lim Kit Siang*, the differences of opinion between the majority and the minority lie on their treatment of the nature of the claim as either private or public matter. The majority adopted the test of *locus* as applied in the private claim while the minority adopted liberal approach of standing and treating the case as within the purview of public interest litigation, hence the different test used.
>
> [164] The constitutional challenge as in the present case does fall under the area of public law, hence the rule of standing as applied by the majority in *Lim Kit Siang* is not proper to be applied.

[46] The plaintiff's counsel went on to postulate that in a situation where the High Court is to decide on cases relating to injunctions against the Government, the principle ought to be relaxed when it involves an application for an interim injunction in an OS, as opposed to a writ action, pursuant to AA 2005 where interim measures are specifically provided as a relief again a contracting party in an arbitration agreement. Learned counsel highlighted that in the face of the conflicting decisions of the Court of Appeal, none of the decisions touches on the power of the High Court to grant the statutorily permitted interim measures as submitted by the plaintiff in the present case.

[47] While this court appreciates the arguments as articulated by the plaintiff's counsel, it does not detract from the fact that the interim measure sought under paras. 11(1)(a) and (c) of the AA 2005 is, in essence, an injunction against the Government and its officer(s). Thus, the issue as to whether the court can grant such an injunction remains a material and relevant consideration.

[48] Following from my conclusion in *Dhaya Maju* that I am "... bound by the decision of the apex court in *UEM*'s case that no injunction can be directly or indirectly issued against the Government or its officers. In so far as the decisions by the Court of Appeal is concerned, this court would opt to follow the clear pronouncement in the later decision in *Tan Bun Teet* that an interim, interlocutory or permanent injunction cannot be granted against the Government under s. 29 GPA 1956 and s. 54 SRA1950". I therefore find and hold that the answer to the second issue is in the negative.

Third Issue: Whether Construction Work Contracts To Which The Government Is A Party Is Included In The List Of Categories Of Contracts As Set Out In The Schedule To Part II Of The Covid-19 Act

The Parties' Submissions

[49] The plaintiff relied on para 4 in its second additional affidavit (encl. 11) in submitting that it was informed by AmBank Islamic that AmBank Islamic had received the defendant's letter calling on the PB on 27 October 2020. Since the Covid-19 Act came into force on 23 October 2020, the plaintiff contended that by virtue of s. 7 of the said Act, the defendant was barred from exercising its rights to call on the PB under the contract.

[50] In opposing the above, the defendant gave the following reasons to support its argument that the Covid-19 Act is not applicable to the Government:

(i) there is no express provision in the Covid-19 Act stating that the said Act applies to the Government or to construction contracts entered into by the Government as compared to other legislation such the Audit Act 1957 (Act 62), Electronic Commerce Act 2006 (Act 658), Construction Industry Payment and Adjudication Act 2012 (Act 746) ('CIPAA') and AA 2005 where such express provisions can be found;

(ii) by virtue of s. 63 of the Interpretation Acts 1948 and 1967 (Act 388), the Covid-19 Act does not bind the Government by necessary implication;

(iii) whilst the Covid-19 Act provides for modification to several Acts of Parliament, it does not contain any modification to the operation of s. 29 of the GPA 1956 and s. 54 of the SRA 1950 pertaining to the grant of injunctions; and

(iv) the Parliament was aware that the Covid-19 Act, in particular Part II, is aimed at dealings between private parties which the Government has no control over. However, in matters over which the Government has control, such as Government construction contracts, the Government has taken voluntary action to provide relief from measures taken to curb

the Covid-19 pandemic and in particular, the Government has issued an internal circular directive to grant automatic EoT in all Government construction projects.

The Findings Of The Court

[51] The term "Covid-19" needs no introduction. It is a topic which has gripped the attention of every nation in the world as the struggle to cope with this disease, which is caused by severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), continues. To date, this global pandemic is proving to be one of the deadliest in history with the number of people who have been infected and the fatalities are in the millions. At the peak of the pandemic, economic and social activities, among others, came to a standstill. In fact, the hearing of the instant applications was conducted by remote communications technology using Skype video conferencing.

[52] Malaysia was among many countries which responded to this virus outbreak by enacting a specific law to provide for temporary measures to reduce the impact of Covid-19, including to modify the relevant provisions in 16 statutes (see the long title to the Covid-19 Act). Section 4 in the Covid-19 Act provides that any reference to "COVID-19" is a reference to the "Coronavirus Disease 2019 (COVID-19)".

[53] The Covid-19 Act came into operation on the date of publication of the Act ie, 23 October 2020 and shall continue to remain in operation for a period of two years from that date (see sub-s. 1(2); according to sub-s. 1(3), the Prime Minister may, by order published in the *Gazette*, extend the operation of the Act and the order for extension may be made more than once).

[54] Section 2 of the Covid-19 Act provides for the "Modification to Acts and Ordinances" in these terms:

> 2. The Limitation Act 1953 (Act 254), the Sabah Limitation Ordinance [Cap. 72 (1952)], the Sarawak Limitation Ordinance (Cap. 49 (1958 Ed.)), the Public Authorities Protection Act 1948 (Act 198), the Insolvency Act 1967 (Act 360), the Hire-Purchase Act 1967 (Act 212), the Consumer Protection Act 1999 (Act 599), the Distress Act 1951 (Act 255), the Housing Development (Control and Licensing) Act 1966 (Act 118), the Industrial Relations Act 1967 (Act 177), the Private Employment Agencies Act 1981 (Act 246), the Land Public Transport Act 2010 (Act 715), the Commercial Vehicles Licensing Board Act 1987 (Act 334), the Courts of Judicature Act 1964 (Act 91), the Subordinate Courts Act 1948 (Act 92) and the Subordinate Courts Rules Act 1955 [Act 55] are modified in the manner specified in Parts III, IV, V, VI, VII, VIII, IX, X, XI, XII, XIII, XIV, XV, XVI, XVII and XVIII respectively.

[55] Part II of the Covid-19 Act provides relief for contracting parties who are unable to perform contractual obligations arising from any of the categories of contracts due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 (Act 342). Part II is deemed to have come into operation on 18 March 2020 and shall continue to remain in operation until 31 December 2020. The Minister charged with the responsibility for law has since extended the operation of Part II until 31 March 2021, 30 June 2021 and 31 December 2021 by the Temporary Measures for Reducing The Impact of Coronavirus Disease 2019 (Covid-19) (Extension Of Operation) Order 2020, Order 2021 and (No. 2) Order 2021 [P.U. (A) 386/2020, P.U. (A) 121/2021 and P.U. (A) 287/2021] which was published in the *Gazette* on 29 December 2020, 19 March 2021 and 30 June 2021, respectively (see ss. 5 and 6 of the Covid-19 Act).

[56] Section 7 in Part II of the Covid-19 Act states that:

> **Inability to perform contractual obligation**
>
> 7. The inability of any party or parties to perform any contractual obligation arising from any of the categories of contracts specified in the Schedule to this Part due to the measures prescribed, made or taken under the Prevention and Control of Infectious Diseases Act 1988 (Act 342) to control or prevent the spread of COVID-19 shall not give rise to the other party or parties exercising his or their rights under the contract.

[57] Seven categories of contracts are specified in the Schedule to Part II and these include the following:

> 1. Construction work contract or construction consultancy contract and any other contract related to the supply of construction material, equipment or workers in connection with a construction contract.
>
> 2. Performance bond or equivalent that is granted pursuant to a construction contract or supply contract … .

[58] After having scrutinised the Covid-19 Act, it is evident that there is no express provision in the said Act which states that it is to apply to construction contracts and/or construction work contracts entered into by the Government. This is in stark contrast to s. 2 of the CIPAA which stipulates that the CIPAA "… applies to every construction contract made in writing relating to construction work carried out wholly or partly within the territory of Malaysia including a construction contract entered into by the Government."

[59] The SFC had also given examples of other statutes which have expressly stated that the legislation is binding on the Government, namely:

(i) Arbitration Act 2005 (Act 646):

Government is to be bound by the legislation

5. This Act shall apply to any arbitration to which the Federal Government or the Government of any component state of Malaysia is a party.

(ii) Electronic Commerce Act 2006 (Act 658):

Application

2(1) Subject to section 3, this Act shall apply to any commercial transaction conducted through electronic means including commercial transactions by the Federal and State Governments; and

(iii) Audit Act 1957 (Act 62):

Short Title

1(2) This Act shall apply to the audit of the accounts of the Federation, of the States and of such other public authorities and specified bodies as are subject to audit by the Auditor General.

[60] In the absence of an express provision that "construction work contract" shall include contracts which are entered into by the Government as a party, the next question which arises for determination is whether the Covid-19 Act is applicable to such Government contracts by necessary implication.

[61] In this respect, s. 63 of Act 388 reads as follows:

Saving of rights of Yang di-Pertuan Agong and Government

63. No written law shall in any manner whatsoever affect the rights of the Yang di-Pertuan Agong or the Government unless it is expressly provided or it appears by necessary implication that the Yang di-Pertuan Agong or the Government, as the case may be, is to be bound thereby.

[62] In *The Province of Bombay v. The Municipal Corporation of the City of Bombay and Another* [1947] AC 58, Lord Du Parcq in delivering the judgment of the Lords of the Judicial Committee of the Privy Council said:

The general principle to be applied in considering whether or not the Crown is bound by general words in a statute is not in doubt. The maxim of the law in early times was that no statute bound the Crown unless the Crown was expressly named therein, "*Roy n'est lie par ascun statue si il ne soit expressement nosme.*" But the rule so laid down is subject to at least one exception. The Crown may be bound, as has often been said, "by necessary implication." If, that is to say, it is manifest from the very terms of the statute, that it was the intention of the legislature that the Crown should be bound, then the result is the same as if the Crown had been expressly named. It must then be inferred that the Crown, by assenting to the law, agreed to be bound by its provisions.

[63] Apart from *The Province of Bombay*, the SFC had also cited the case authorities of *Moore v. Smith* [1859] 5 Jur NS 892, *Estate Trust Agencies (1927) Ltd v. Sim Teng Chew* [1947] 1 LNS 22; [1948] 1 MLJ 20b, *Lord Advocate v. Dumbarton District Council* [1990] 2 AC 580, *Ong Bee Yam v. Pengarah Hasil Dalam Negeri, Sarawak & Anor* [2002] 3 MLJ 389 and *R (on the application of Black) v. Secretary of State for Justice* [2017] UKSC 81 to support her argument that, in the absence of express words to say that the Government is bound, the general rule is that the Government is not bound by any statutory provision unless it can be construed or gathered from the terms of the relevant Act an intention to that effect.

[64] In *R (on the application of Black)*, the question which arose for consideration of the Supreme Court was whether the Crown is bound by the prohibition of smoking in most enclosed public places and workplaces contained in Ch 1 of Pt 1 of the Health Act 2006. Lady Hale in delivering the judgment of the court elucidated on the test to be applied in the following passage:

> [36] It is certainly open to this court to clarify the test, even if such clarification has the effect of modifying the understanding which some, at least, may have had of it. We can begin with some simple propositions:
>
> (1) The Crown is not bound by a statutory provision except by express words or necessary implication.
>
> (2) This is not an immunity from liability, strictly so-called, but a rule of statutory interpretation.
>
> (3) The goal of all statutory interpretation is to discover the intention of the legislation.
>
> (4) That intention is to be gathered from the words used by Parliament, considered in the light of their context and their purpose. …
>
> (5) In considering the intention of the legislation, it is not enough that it is intended for the public good or that it would be even more beneficial for the public if the Crown were bound.
>
> (6) However, it is not necessary that the purpose of the legislation would be 'wholly frustrated' if the Crown were not bound. …
>
> (7) In considering whether the purpose of the Act can be achieved without the Crown being bound, it is permissible to consider the extent to which the Crown is likely voluntarily to take action to achieve it. Inaction cannot be assumed. It may be that the Act's purpose can as well be achieved by the Crown exercising its powers properly and in the public interest. But if it cannot, that is a factor to be taken into account in determining the intention of the legislation.

[37] In my view, that is all that need be said. It is neither necessary nor desirable to add further glosses to the test, or to characterise it by adjectives such as 'strict'. The question is whether, in the light of the words used, their context and the purpose of the legislation, Parliament must have meant the Crown to be bound.

[65] In applying the test to the facts of the case, the Supreme Court found that there were some strong points in favour of the conclusion that Parliament did intend for the Crown to be bound by the smoking ban, however, the court went on to say that:

[43] Against all that, *there are powerful indicators in the language of the Act itself that the Crown was not to be bound by the smoking ban. First and foremost, it does not say so and it would have been easy enough so to do.*

[44] Secondly, in Acts with comparable structures and enforcement powers, *there are provisions dealing expressly with exactly how and to what extent the Act is to apply to the Crown.* …

…

[48] Had Parliament intended Pt 1 of Ch 1 of the 2006 Act to bind the Crown, nothing would have been easier than to insert such a provision into that Part. It would have made clear who could be prosecuted for the offences created. Furthermore, the Report of the Health Committee does indicate that Parliament was alive to the question of whether the smoking ban would bind the Crown and aware of the case for further exemptions if the Act were to do so. It might also be taken to indicate that Parliament was aware that the mischief at which the Bill was aimed was smoking on private premises over which the Government had no control.

…

[50] Thus, not without considerable reluctance, I am driven to the conclusion that this appeal must fail. *There is a presumption that Acts of Parliament only bind the Crown by express words or necessary implication. Necessary implication entails that Parliament must have meant to bind the Crown. The fact that where Parliament did mean to do so in this Act, it said so, and made tailored provision accordingly, is to my mind conclusive of the question.*

(emphasis added)

[66] In rebutting the defendant's submission, the plaintiff drew my attention to *Broom's Legal Maxims: Classified and Illustrated, New Eleventh Edition (Thoroughly Revised, Updated and Enlarged)*, Universal Law Publishing Co Ltd, 2013 by Dr. R.G. Chaturvedi, and *A Selection of Legal Maxims: Classified and Illustrated* by Herbert Broom, T. & J.W. Johnson & Co. Law Booksellers, Publishers and Importers, 1874 which is said to support the proposition that in general, the Crown is not bound by a statute, unless expressly mentioned or where the Crown must have been intended to be bound by necessary implication as in the case where the statute is passed for the public good; the preservation of public rights and the suppression of public wrongs; the relief and maintenance of the poor; the general advancement of learning; and justice; or for the prevention of fraud.

[67] The plaintiff additionally submitted that the word "including" in the long title of the Covid-19 Act demonstrates that the intention of the Act is broad and must include the Government as there is reference to the Public Authorities Protection Act 1948 ('PAPA 1948'), not only in the long title, but in s. 2 and Part VI on the modifications to the PAPA 1948 as well. The PAPA 1948 is an Act relating to the protection of persons acting in the execution of statutory and other public duties and provides that any suit, action, prosecution or other proceeding against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority must be commenced within 36 months after the act, neglect or default complained of.

[68] The plaintiff went further by referring to *The Explanation To The Temporary Measures For Reducing The Impact Of Coronavirus Disease 2019* (Covid-19) Bill 2020, which states as follows:

> This Bill ("the proposed Act") aims to support the Prihatin Rakyat Economic Stimulus Package, the Prihatin SME Economic Stimulus Package and the Short-Term Economic Recovery Plan announced by the Prime Minister on 27 March 2020, 6 April 2020 and 5 June 2020 respectively **and** to mitigate the financial and social impact due to the Coronavirus Disease 2019 (COVID-19). This Bill seeks to provide for temporary measures to reduce the impact of COVID-19 and to modify sixteen legislation namely the Limitation Act 1953, the Sabah Limitation Ordinance, the Sarawak Limitation Ordinance, the Public Authorities Protection Act 1948, the Insolvency Act 1967, the Hire-Purchase Act 1967, the Consumer Protection Act 1999, the Distress Act 1951, the Housing Development (Control and Licensing) Act 1966, the Industrial Relations Act 1967, the Private Employment Agencies Act 1981, the Land Public Transport Act 2010, the Commercial Vehicles Licensing Board Act 1987, the Courts of Judicature Act 1964, the Subordinate Courts Act 1948 and the Subordinate Courts Rules Act 1955. (emphasis added)

in submitting that the word "and" as emphasised in the excerpt above shows that the intention of the Act is wide and include any liabilities by the Government in civil matters including contracts.

[69] I have given careful consideration to the juxtaposed submissions by the parties and in my view, the real question which arises for determination in this case is whether item 1 in the list of categories of contracts as set out in the Schedule for purposes of s. 7 of the Covid-19 Act ('said item 1') is applicable, by necessary implication, to construction work contracts which have been entered into by the Government as one of the parties to the same.

[70] In considering the issue as to whether Parliament intended for the scope of the said item 1 to extend to construction work contracts executed by the Government, this court is reminded that in *Dr Koay Cheng Boon v.*

Majlis Perubatan Malaysia [2012] 4 CLJ 445, the Federal Court had said at p 447 that "A statute is the written will of the Legislature and it is the fundamental rule of interpretation of a statute that it should be expounded according to the intent of Parliament. The courts must use the literal rule where a clear meaning of a statute will allow it, ie, interpret the statute literally, according to its ordinary plain meaning".

[71] In another decision of the apex court as delivered by Vernon Ong FCJ, namely *Tebin Mostapa v. Hulba-Danyal Balia & Anor* [2020] 7 CLJ 561, His Lordship expounded the principles of statutory interpretation at p. 581 in these words:

> [30] In our opinion, the rules governing statutory interpretation may be summarised as follows. First, *in construing a statute, effect must be given to the object and intent of the Legislature in enacting the statute. Accordingly, the duty of the court is limited to interpreting the words used by the Legislature and to give effect to the words used by it. The court will not read words into a statute unless clear reason for it is to be found in the statute itself. Therefore, in construing any statute, the court will look at the words in the statute and apply the plain and ordinary meaning of the words in the statute. Second, if, however the words employed are not clear, then the court may adopt the purposive approach in construing the meaning of the words used.* Section 17A of the Interpretation Acts 1948 and 1967 provides for a purposive approach in the interpretation of statutes. Therefore, *where the words of a statute are unambiguous, plain and clear, they must be given their natural and ordinary meaning. The statute should be construed as a whole and the words used in a section must be given their plain grammatical meaning. It is not the province of the court to add or subtract any word; the duty of the court is limited to interpreting the words used by the Legislature and it has no power to fill in the gaps disclosed.* Even if the words in a statute may be ambiguous, the power and duty of the court "to travel outside them on a voyage of discovery are strictly limited." Third, the relevant provisions of an enactment must be read in accordance with the legislative purpose and applies especially where the literal meaning is clear and reflects the purposes of the enactment. This is done by reference to the words used in the provision; where it becomes necessary to consider every word in each section and give its widest significance. An interpretation which would advance the object and purpose of the enactment must be the prime consideration of the court, so as to give full meaning and effect to it in the achievement to the declared objective. As such, in taking a purposive approach, the court is prepared to look at much extraneous materials that bears on the background against which the legislation was enacted. It follows that a statute has to be read in the correct context and that as such the court is permitted to read additional words into a statutory provision where clear reasons for doing so are to be found in the statute itself. (emphasis added)

[72] In my view, there is nothing ambiguous about the words used in the said item 1 and they should be given their natural and ordinary meaning whereby "Government construction works contract" is clearly not included.

[73] The fact that there are express provisions to modify the PAPA 1948 in the Covid-19 Act goes to show that if Parliament had intended to modify s. 29 of the GPA and s. 54(d) SRA1950 in so far as the granting of injunctions against the Government are concerned, the simplest thing would be to say so by including these statutes in s. 2 of the Covid-19 Act and providing for a dedicated Part in the Act as to the extent of the modifications.

[74] Similarly, if the said item 1 was meant to cover Government construction work contracts, it would be easy enough for the Legislature to use the words akin to s. 2 of the CIPAA to reflect such intention, namely to include construction contracts entered into by the Government.

[75] Even assuming for a moment that the words employed in the said item 1 are not clear as to whether Government construction work contracts are to be encompassed within it, just because the Covid-19 Act is intended to alleviate the financial and social impact of Covid-19 on the people of this country does not necessarily mean that the said item 1 must surely have been intended to cover construction work contracts to which the Government is a party. Nor is such conclusion to be made just because it would be more beneficial for the public if the said item 1 is to encompass such construction work contracts.

[76] Generally speaking, it is well-accepted that the Government has taken active measures to achieve the objective of cushioning the adverse and far-reaching effects of Covid-19. The Government has implemented various stimulus packages and provided significant fiscal support in the form of cash transfers, tax incentives and wage subsidies, along with financial measures, including loan moratoriums and the establishment of various financing facilities. These policy measures have provided immediate relief to, among others, businesses and eased the cash flow constraints on those badly affected by the deterioration in economic activities resulting from pandemic-related lockdowns (see *Bank Negara Malaysia, Economic and Monetary Review 2020*). The Covid-19 Act is undoubtedly one of the measures in the arsenal to combat the onslaught of the deadly virus.

[77] However, in my opinion, the purpose of the Covid-19 Act can still be achieved without including Government construction work contracts in the said item 1. Such contracts are well within the control of the Government through the issuance of, among others, administrative circulars. Specifically, in the context of the project under consideration, the Superintending Officer had issued the certificate of delay and extension of time no. 4 dated 23 June 2020 (see exh. "AB3" in the affidavit in reply ('AIR'), encl. 19) wherein he certified that the progress and completion of the overall works

has been delayed beyond the date of completion previously approved ie, 23 January 2020 due to "Arahan Perintah Kawalan Pergerakan selaras dengan ketetapan Kerajaan" with a period of delay of 84 days and an EoT was granted from 18 March 2020 to 9 June 2020.

[78] Based on my assessment of the affidavit evidence and submissions of the parties, it is my finding that if Parliament had intended to include Government construction work contracts in the said item 1, it would have provided words to that effect in the Schedule to Part II of the Covid-19 Act. By not having done so, I am not prepared to hold that Government construction work contracts are meant to be covered by necessary implication.

Fourth Issue: If The Covid-19 Act Is Applicable, Whether:

(i) The Plaintiff Has Established The Elements Of s. 7; and
(ii) The Facts Fall Within The Savings Clause In s. 10

[79] On the assumption that my conclusion in respect of the third issue is in error, it is my considered view that the plaintiff has failed to establish the requirements of s. 7 of the Covid-19 Act. The manner in which the plaintiff has presented its case is merely to say that there is a pandemic, the MCO had been implemented since 18 March 2020, the plaintiff was not able to perform its obligation under the contract and therefore the termination of the contract is invalid and unconscionable, and the defendant cannot exercise its right to call on the PB.

[80] With respect, I do not think that a party can simply invoke s. 7 of the Covid-19 Act just because the country is experiencing a pandemic and that there have been, and still are, MCO in force to curb the spread of the disease. The situation plaguing the nation, in general, and the plaintiff as a contractor for the project, in particular, does not relieve the plaintiff from the burden of proving, on a balance of probabilities, that:

(i) it is unable to perform any contractual obligation whereby the precise duty or duties under the contract should be specified;

(ii) the inability to perform the contractual obligation arises from one of the categories of contracts as listed in the Schedule to Part II of the Covid-19 Act; and

(iii) the inability to perform the contractual obligation is due to the measures prescribed, made or taken under Act 342 to control or prevent the spread of Covid-19. The precise measure as prescribed, made or taken under Act 342 must be identified and the nexus between the said measure and the plaintiff's inability to perform its contractual obligation(s) must be demonstrated.

Hence, even if the plaintiff has established that its contract with the defendant falls under the said item 1, the plaintiff has clearly failed to prove elements (i) and (iii) as outlined above to the satisfaction of this court.

[81] Moving on to the issue as regards s. 10 of the Covid-19 Act, the provision reads as follows:

> **Saving**
>
> 10. Notwithstanding section 7, **any contract terminated, any deposit or performance bond forfeited,** any damages received, any legal proceedings, arbitration or mediation commenced, any judgment or award granted and any execution carried out **for the period from 18 March 2020 until the date of publication of this Act (23 October 2020) shall be deemed to have been validly terminated, forfeited,** received, commenced, granted or carried out. (emphasis added)

[82] The defendant argued that, based on the saving provision and with reference to the Parliamentary Hansards on the tabling of the Covid-19 Bill and the explanation given by the Minister charged with the responsibility for law on the intended effect of the said provision, the termination of the contract and the call on the PB by the defendant, which fell within the period as stipulated therein ie, on 12 October 2020 and 19 October 2020 (the date that the defendant's letter was sent by AR registered post and was received by AmBank Islamic on 23 October 2020), respectively, is deemed to have been validly terminated and forfeited. It was also contended that any dispute or factual allegation by the plaintiff can be raised and addressed in the arbitration proceedings as it is not for this court to go into the merits of the dispute between the parties.

[83] The plaintiff in its affidavits averred that:

(i) it received the 19 October 2020 letter on 27 October 2020 (see encl. 8);

(ii) it was informed by AmBank Islamic that AmBank Islamic had received the 19 October 2020 letter on 27 October 2020 and a purported excerpt of the same with the date "20 Oct 27 12:03" printed with a franking machine was produced as exh. "SMS2" in encl. 11; and

(iii) AmBank Islamic had received the 19 October 2020 letter on 27 December 2020 and the plaintiff's solicitor will submit on the issue of the service of the same and the applicable legal provisions to prove that the service and the call on the PB is invalid (see encl. 21).

[84] In the written submission, the plaintiff argued that by looking at the defendant's exhs. "AB2", "AB7" and "AB8" in encl. 19, the defendant has failed to establish that AmBank Islamic received the 19 October 2020 letter on 27 October 2020 because the chop on the AR card shows the name of the recipient as "AmBank (M) Berhad (P.O. Box 12540), Menara AmBank, No.

8, Jalan Yap Kwan Seng, 50450 Kuala Lumpur". The plaintiff even went on to cite the definition of "Islamic bank" in s. 2 of the Islamic Banking Act 1983 (Act 276) to support its contention that AmBank Islamic and AmBank (M) Berhad are two separate entities. However, as pointed out by the SFC, Act 276 was repealed by s. 282 of the Islamic Financial Services Act 2013 (Act 759).

[85] In this case, the date on which AmBank Islamic received the 19 October 2020 letter is important in view of the defendant's invocation of s. 10 of the Covid-19 Act. The defendant is able to rely on the saving provision only if the 19 October 2020 letter was received by AmBank on 23 October 2020 which happens to be the date of publication of the Covid-19 Act and the last date on which the forfeiture of any performance shall be deemed to be validly forfeited.

[86] After having considered the averments, exhibits and submissions of the parties on this issue, I find that the defendant has proven, on a balance of probabilities, that the 19 October 2020 letter was received by AmBank on 23 October 2020 as evidenced by the acknowledgement of receipt by one "M. Yuzi" on the AR card and Pos Malaysia's e-tracking. AmBank Islamic is located on the 24th floor of Menara AmBank which is located at the same address as AmBank (M) Berhad and by acknowledging receipt of the 19 October 2020 letter, the person who received the same has indicated that he has the authority to do so on behalf of AmBank Islamic.

[87] On the other hand, the plaintiff has made contradictory averments as to the date that it alleged AmBank Islamic actually received the 19 October 2020 letter ie, 27 October 2020 and 27 December 2020 and furthermore, exh. "SMS2" merely shows a printed date without any evidence as to who printed the date and what it represents.

[88] The plaintiff similarly questioned the validity of the notice of termination on the ground that on 12 October 2020, it was informed about the termination *via* e-mail whereas the contract requires such notice to be served personally and/or be sent by registered post. The plaintiff further averred that in so far as the personal service is concerned, its Project Manager, En. Mohd. Asri bin Che Daud had refused to accept service because the document that the defendant intended to serve was only a photocopy and not an original copy and service was attempted at the project site and not at the plaintiff's address as stated in the contract.

[89] The defendant refuted the plaintiff's averments by referring to cl. 67.0 on "Notice, ETC." in the contract where the salient part of the clause is re-produced below:

> 67.1 Any notice, approval, consent, request or other communication required or permitted to be given or made under this Contract shall be in writing in Bahasa Malaysia or English language.

67.2 Such notice shall be effected by:

(i) hand delivery or courier and an acknowledgement of receipt obtained;

(ii) leaving the notice at the registered office or site office of the Contractor in which case it shall be deemed to have been duly delivered; or

(iii) registered post in which case it shall be deemed to have been received seven (7) days after the date of posting.

67.3 The address of the Government and the Contractor is as shown below or such other address as either party may have notified the sender:

to the Government:

…

to the Contractor:

Address: S.N. Akmida Holdings Sdn Bhd
No. 16-1-1B, First Floor,
Jalan Medan PB 2A,
Seksyen 9, Pusat Bandar Bangi,
Bdr Baru Bangi, 43650
Bandar Baru Bangi Selangor.

[90] Based on the affirmations made by the parties and exhs. "AB4" and "AB5" in encl. 19, it is obvious that the plaintiff's contentions as to the service of the notice of termination is baseless. En. Abdul Razak bin Abdul Hamid, Penolong Pengurus Besar Pembinaan, Pasukan Projek Persekutuan Negeri Pahang, Projek Hospital Bera had issued a signed statement that he had served the said notice together with the stop work order by hand to En. Mohd. Asri on 14 October 2020, 10am at the "Bilik Pengurus Projek, Pejabat Tapak Kontraktor" but En. Mohd. Asri refused to acknowledge receipt of the documents by placing his signature.

[91] Even if the court was to accept the plaintiff's explanation as to why En. Asri refused to acknowledge receipt of the documents, the defendant has shown proof that the notice of termination was delivered by registered post to the plaintiff's address as stated in cl. 67.3 of the contract on 16 October 2020. Therefore, the said notice was effected in accordance with cl. 67.2(iii) of the contract.

[92] Following from the factual findings as discussed above, the defendant is entitled to rely on s. 10 of the Covid-19 Act which provides that notwithstanding the invocation of s. 7 by the plaintiff, the termination of the contract and the forfeiture of the PB during the period from 18 March 2020 until 23 October 2020 shall be deemed to have been validly terminated and

forfeited. This conclusion is made based on the natural and ordinary meaning of the words in s. 10 and without the need to resort to Parliamentary Hansards.

[93] For purposes of the plaintiff's applications in encls. 1 and 4, the parties did not submit on the interplay of ss. 7 and 10 of the Covid-19 Act and nor do I think that it is necessary as the applications can be decided based on the justifications as above-stated.

[94] All the matters raised by the plaintiff in its affidavits as to the performance of the parties' contractual obligations are testament of there being a genuine contractual dispute between the parties and the issues arising thereto, including the issue as to whether the pandemic is a natural catastrophe and thus constitutes an event of *force majeure* under cl. 58.2(c) of the contract, are matters which can be resolved by way of arbitration as per the arbitration agreement in cl. 66.0 of the contract.

Pronouncement

[95] It is for all of the aforesaid reasons that the order was made to dismiss the plaintiff's applications in encls. 1 and 4 with costs of RM6,500 for each application.